

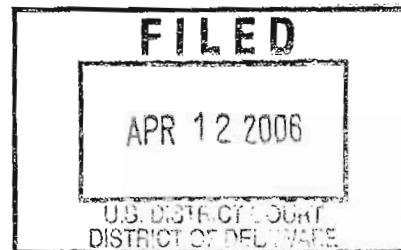
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

NIKERRAY MIDDLEBROOK,
Petitioner,

v.

Thomas CARROLL,
Warden and CARL C. DANBERG,
Attorney General of State of
Delaware,
Respondents.

Petitioner's
Appendix



RD Scanned

Appendix Table of Contents

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| Superior Court Criminal Docket | ... | ... | Ex. 1 |
| Motion for PostConviction Relief | ... | ... | Ex. 2 |
| Argument III. | ... | ... | Ex. 2 |

SUPERIOR COURT CRIMINAL DOCKET
(as of 03/31/2006)

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State of Delaware v. NIKERRAY K MIDDLEBROOK DOB: 07/04/1974
 State's Atty: JOHN A BARBER , Esq. AKA: NIKERRAY MIDDLEBROOK
 Defense Atty: CAROLINE P AYRES , Esq. NIKERRAY MIDDLEBROOK

| No. | Event Date | Event | Judge |
|-----|---------------|--|-------|
| | | RE: NOTICE TO SHOW CAUSE. | |
| 140 | 02/04/2005 | LETTER FROM SUPREME COURT TO SHARON AGNEW, PROTHONOTARY RE: THE RECORD IS DUE TO BE FILED 02/25/05 30, 2005 | |
| 141 | 02/25/2005 | RECEIPT FROM SUPREME ACKNOWLEDGING RECORD. 30, 2005 | |
| 142 | 10/12/2005 | MANDATE FILED FROM SUPREME COURT: SUPERIOR COURT JUDGMENT AFFIRMED. SUPREME COURT CASE NO: 30, 2005 SUBMITTED: JULY 29,2005 DECIDED: SEPTEMBER 21,2005 BEFORE HOLLAND,JACOBS AND RIDGELY, JUSTICES. | |
| 143 | 01/27/2006 | MOTION FOR POSTCONVICTION RELIEF FILED. PRO SE REFERRED TO JUDGE SILVERMAN | |
| 144 | 01/30/2006 | LETTER FROM A. HAIRSTON, PROTHONOTARY OFFICE TO STEVEN WOOD, DAG RE: NOTICE OF FILING OF PRO SE MOTION FOR POSTCONVICTION RELIEF. | |
| 145 | 02/09/2006 | SILVERMAN FRED S. ORDER: DEFENDANT FILED HIS SECOND MOTION FOR POSTCONVICTION RELIEF UNDER SUPERIOR COURT CRIM. RULE 61 ON JANUARY 27, 2006. THIS TIME, DEFENDANT WANTS DNA TESTING PERFORMED ON A FACE MASK, WHICH WITNESSES TESTIFIED THAT DEFENDANT WAS WEARING WHEN HE SHOT TWO PEOPLE. UNDER RULE 61(D) THE COURT HAS PRELIMINARY CONSIDERED THE MOTION. BECAUSE THE CLAIM CONCERNS DNA TESTING AND IT GOES TO DEFENDANT'S ACTUAL GUILT OR INNOCENCE, THE COURT DECLINES TO APPLY THE BARS TO RELIEF SET OUT IN RULE 61(I). THE COURT, HOWEVER, WILL NOT ORDER DNA TESTING SIMPLY BECAUSE DEFENDANT HAS ASKED FOR IT. UNDER RULE 61(F) THE ATTORNEY GENERAL SHALL FILE A RESPONSE TO THE MOTION. PRIMARILY, THE COURT IS INTERESTED IN TWO THINGS: FIRST, WAS THE CHAIN OF CUSTODY PRESERVED IN A WAY THAT WOULD POTENTIALLY MAKE DNA TEST RESULTS MEANINGFUL. FOR EXAMPLE, DID THE JURY AND OTHERS HAVE AN OPPORTUNITY TO HANDLE THE MASK DIRECTLY, POTENTIALLY CONTAMINATING IT. SECOND, THE COURT WILL CONSIDER ATTORNEY GENERAL'S ARGUEMENT AS TO WHETHER, ASSUMI NG THE MASK WAS NOT TAINTED, DNA TESTING IS POTENTIALLY HELPFUL TO DEFENDANT. OF COURSE, THE ATTORNEY GENERAL HAS LEAVE TO PERFORM DNA TESTING WITHOUT FURTHER ORDER. THE ATTORNEY GENERAL SHALL SERVE THE STATE'S RESPONSE ON DEFENDANT, IN THE TIME CALLED FOR RULE 61(F) THEREAFTER, THE COURT MAY DEEM THE MOTION UNOPPOSED. DEFENDANT MAY FILE A REPLY WITHIN 30 DAYS OF SERVICE, AS PROVIDED UNDER RULE 61(F) (3 | |

SUPERIOR COURT CRIMINAL DOCKET
(as of 03/31/2006)

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State of Delaware v. NIKERRAY K MIDDLEBROOK DOB: 07/04/1974
 State's Atty: JOHN A BARBER , Esq. AKA: NIKERRAY MIDDLEBROOK
 Defense Atty: CAROLINE P AYRES , Esq. NIKERRAY MIDDLEBROOK

| No. | Event Date | Event | Judge |
|-----|---------------|--|-------------------|
| | | <p>) . THE COURT WILL CONSIDER WHETHER TO ORDER DNA TESTING, EXPAND THE RECORD FURTHER, DENY THE PETITION, OR DO SOMETHING ELSE. MEANWHILE THE PARTIES DO NOT TO HAVE LEAVE TO FILE FURTHER SUBMISSIONS BEYOND THE TWO CONTEMPLATED BY THIS ORDER, AND THOSE ARE THE ONLY SUBMISSIONS THAT THE COURT WILL CONSIDER. IT IS SO ORDERED.</p> | |
| 146 | 03/24/2006 | LETTER FROM ROBERT SURLS, DAG TO JUDGE SILVERMAN. RE: RULE 61 THE STATE THEREFORE REQUEST A TWO WEEK EXTENSION FROM TODAY TO FILE IT'S RESPONSE. SO ORDERED. 3/22/06 | SILVERMAN FRED S. |

*** END OF DOCKET LISTING AS OF 03/31/2006 ***
 PRINTED BY: CSCACOL

SUPERIOR COURT
OF THE
STATE OF DELAWARE

SHARON D. AGNEW
PROTHONOTARY, NEW CASTLE COUNTY

NEW CASTLE COUNTY COURT HOUSE
500 N. KING STREET
LOWER LEVEL 1, SUITE 500
WILMINGTON, DE 19801-3746
(302) 255-0800

JUDGEMENT DEPARTMENT
500 N. KING STREET
1ST FLOOR, SUITE 1500
WILMINGTON, DE 19801-3704
(302) 255-0556

TO: Robert Surles
Department of Justice

FROM: Angela M. Hairston, Criminal Deputy

DATE: October 31, 2003

RE: State of Delaware v. Nikerray Middlebrook
Case I.D.# 9608015635
Cr.A. # IN96-09-1119R1, 1120R1, 1121R1, 1122R1, 1795R1

The enclosed motion for postconviction relief was filed by the defendant in the above captioned case on October 28, 2003. The State is not required to file a response unless ordered, pursuant to Super.Ct.Crim.R 61(c)(4) and 61(f)(1).

Thank you very much.

cc: file

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

#131

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE

v.

NIKERRAY MIDDLEBROOK

Name of Movant on Indictment

NIKERRAY MIDDLEBROOK

Correct Full Name of Movant

IN 96-09-1119-RJ
IN 96-09-1120-RJ
IN 96-09-1121-RJ
No.

(to be supplied by Prothonotary)

IN 96-09-1122-RJ
IN 96-09-1745-RJ

MOTION FOR POSTCONVICTION RELIEF

MOTION

1. County in which you were convicted New Castle.
2. Judge who imposed sentence Fred Silverman.
3. Date sentence was imposed June 12, 1998.
4. Offense(s) for which you were sentenced and length of sentence (s):
Attempted Murder 1st - 25 years at level 5; Assault 1st - 2 years at level 5;
2 counts of Possession of a Firearm During the Commission of a Felony -
10 years at level 5; and PDWBPP - 1 year at level 5 suspended for 1 year probation.
5. Do you have any sentence(s) to serve other than the sentence(s) imposed because of the judgment(s) under attack in this motion? Yes () No (☒)
If your answer is "yes," give the following information:
Name and location of court(s) which imposed the other sentence(s):

Date sentence(s) imposed: N/A.
Length of sentence(s) N/A.
6. What was the basis for the judgment(s) of conviction? (Check one)
Plea of guilty ()
Plea of guilty without admission of guilt ("Robinson plea") ()
Plea of nolo contendere ()
Verdict of jury (☒)
Finding of judge (non-jury trial) ()
7. Judge who accepted plea or presided at trial Fred Silverman.
8. Did you take the witness stand and testify? (Check one)
No trial () Yes () No (☒)
9. Did you appeal from the judgment of conviction? Yes (☒) No ()
If your answer is "yes," give the following information:
Case number of appeal 424/427, 2000.
Date of court's final order or opinion January 28, 2003.

10. Other than a direct appeal from the judgment(s) of conviction, have you filed any other motion(s) or petition(s) seeking relief from the judgment(s) in state or federal court?
 Yes (☒) No (☐) How many? (2)
 If your answer is "yes," give the following information as to each:

Nature of proceeding(s) New trial motion and Post Conviction Relief.

Grounds raised Ineffective assistance of Counsel and Newly Discovered Evidence.

Was there an evidentiary hearing? No.

Case number of proceeding(s) 9608015635.

Date(s) of court's final order(s) or opinion(s) November 17, 1998 and August 21, 2000.

Did you appeal the result(s)? No.

11. Give the name of each attorney who represented you at the following stages of the proceedings relating to the judgment(s) under attack in this motion:

At plea of guilty or trial James Bayard.

On appeal Jerome Capone.

In any postconviction proceeding Caroline Ayres.

12. State every ground on which you claim that your rights were violated. If you fail to set forth all grounds in this motion, you may be barred from raising additional grounds at a later date. You must state facts in support of the ground(s) which you claim. For your information, the following is a list of frequently raised grounds for relief (you may also raise grounds that are not listed here): double jeopardy; illegal detention, arrest, or search and seizure; coerced confession or guilty plea; uninformed waiver of the right to counsel, to remain silent, or to speedy trial; denial of the right to confront witnesses, to subpoena witnesses, to testify, or to effective assistance of counsel; suppression of favorable evidence; unfulfilled plea agreement.

Ground one: ABUSE OF DISCRETION
Supporting facts (state the facts briefly without citing cases):
(See attached Memorandum of Law)

Ground two: ERROR OF LAW
Supporting facts (state the facts briefly without citing cases):
(See attached Memorandum of Law)

Ground three: 6th AND 14th Amendment Violation
Supporting facts (state the facts briefly without citing cases):
(See attached Memorandum of Law)

If any of the grounds listed were not previously raised, state briefly what grounds were not raised, and give your reason(s) for not doing so: Any of the grounds listed were not previously raised because of Ineffective assistance of Counsel.

Wherefore, movant asks that the court grant him all relief to which he may be entitled in this proceeding.

Signature of attorney (if any)

I declare the truth of the above under penalty of perjury.

10/22/03
Date Signed

W. J. Middle
Signature of Movant
(Notarization not required)

III. The delay of over 47 months between the defendant's arrest, trial, conviction, original sentence and reimposed sentence may have violated his Sixth Amendment right to a speedy trial, and the passage of over 28 months from notice of appeal to affirmance of Judgment of his direct appeal by the Supreme Court may have violated his right to due process under the 14th Amendment to a prompt direct appeal causing the defendant unnecessary concern and anxiety and substantial prejudice in violation of both the United States and Delaware Constitutions and the Equal Protection Clause.

Standard and Scope of Review

Barker v. Wingo, 407 U.S. 514 (1972)

ARGUMENT

1. Middlebrook was found guilty after a Jury trial on July 18, 2003 and a sentence date was scheduled for September 5, 1997 at 9:30 AM (almost a year after his arrest).
2. On September 5, 1997, the sentencing hearing was continued at the request of the State Attorney General, Robert S. Siles, without objection from Middlebrook's assistant Public Defender.
3. On September 26, 1997, the Prothonotary docketed Middlebrook's Motion to Dismiss Counsel / for substitution of appointed counsel based on the irreconcilable conflict between Middlebrook and his assistant Public Defender, James Bayard.

4. On October 14, 1997, the Court ruled on Middlebrook's motion to dismiss (see Court's order dated October 14, 1997), specifically whether Middlebrook desired to be sentenced as soon as possible.
5. Only the Court continued to ignore Middlebrook's assertion of the right to a speedy trial.
6. The sentencing phase was unnecessarily delayed for 11 months because of the states intentional attempt to prolong the proceedings to deliberately prejudice Middlebrook. At this point 21 months passed between Middlebrook's arrest, trial, conviction and original sentence. *United States v. Marion*, 404 U.S. 307, 320 (1971), *United States v. Campisi*, 583 F.2d 692, 694 (3d Cir. 1978).
7. After Middlebrook's sentencing hearing on June 12, 1998, his privately retained attorney, Caroline Ayres discovered new evidence in this case and filed a new trial motion under Superior Court Criminal Rule 33. Unfortunately, because of Ayres inexcusable and wanton disregard for the rules of the Court he lost his right to appeal.
8. At this point Middlebrook was left without the skillful hand of Counsel to seek redress from the Court.

9. Middlebrook then filed a number of unsuccessful letters and petitions challenging the injustice of not being able to appeal from his conviction and sentence because of Counsel rendering him ineffective assistance of Counsel. See the Court's docket.
10. Over one and half year elapsed after Middlebrook's June 12, 1998, sentence hearing before the Court recognized Middlebrook's right to file a direct appeal had been lost. On January 11, 2000, the Court granted Middlebrook's motion for appointment of Counsel reappointing the Public Defender to represent him.
11. On January 14, 2000, Public Defender, James Bayard met with Middlebrook at Gander Hill Prison to discuss filing a postconviction motion to the Court.
12. Four months later, Middlebrook filed a letter with the Court expressing his total dissatisfaction with his public defender, Bayard and requested another attorney to be assigned to the case because of the neglect in filing for postconviction relief.
13. On June 2, 2000, Middlebrook filed for post conviction relief raising ineffective assistance of Counsel.
14. On August 21, 2000, after much confusion surrounding middlebrook's original sentencing and the events immediately following the sentencing phase the Court reimposed his sentence, in its entirety to remove the injustice of the loss of his direct appeal. At this point a total of 47 months passed since Middlebrook's arrest.

15. This postverdict delay not only impeded sentencing, but also impeded Middlebrook's direct appeal. See *Evitts v. Lucey*, 469 U.S. 387 (1985); *Griffin v. Illinois*, 351 U.S. 12 (1956).
16. On August 30, 2000, Middlebrook filed a pro se notice of appeal from the Superior Court's sentencing order dated August 21, 2000, because Bayard had failed to recognize his continuing obligation under Supreme Court Rule 26(a). The clerk of the Supreme Court by letter dated August 30, 2000, instructed Bayard of his continuing obligation to represent Middlebrook. On September 5, 2000, Bayard recognized his continuing obligation to represent Middlebrook by filing a formal notice of appeal on behalf of Middlebrook to the Supreme Court.
17. Based on the tumultuous relationship between Middlebrook and Bayard, the apparent conflict, Middlebrook filed a motion to dismiss counsel and leave to proceed pro se on direct appeal.
18. The appellate Court by order dated September 13, 2000, granted Middlebrook's motion for remand for an evidentiary hearing. The Supreme Court retained Jurisdiction and the case was due to be returned from remand by November 13, 2000.

EX-2

19. Because the Superior Court blatantly ignored the Supreme Court's order to hold an evidentiary hearing and to return this case from remand by November 13, 2000, The clerk of the Supreme Court by letter dated November 22, 2000, requesting that a status report be filed on or before December 4, 2000. Eight days after the letter from the Supreme Court Clerk the Superior Court conducted a hearing on the record on November 30, 2000, with respect to Middlebrook's request to pursue his appeal *pro se*.
20. The Superior Court after conducting a relative extensive hearing on Middlebrook's motion to dismiss counsel refused to appoint substitute counsel and forced Middlebrook to represent himself on direct appeal, in spite remaining convinced the decision was a mistake.
21. The trial Judge's order dated December 4, 2000, was approved and adopted by the Supreme Court without the trial record on December 6, 2000. The Court then issued a brief schedule.
22. Because of the delay of transmitting the record and the confusion surrounding this case Middlebrook was unfairly and unjustly forced to attempt to defend this case and an unrelated case; both cases were consolidated before the Court on January 30, 2001, without such things as law library access, the trial transcripts and record, etc. Finally, on May 11, 2001, after having the opportunity to consider the briefs on appeal as well as the trial record the Court concluded that the instructions contained in its remand were incomplete.

So this case was once again remanded to the Superior Court. The case was due to be returned from remand by June 11, 2001.

23. Nonetheless, the delays persisted, an evidentiary hearing scheduled for May 31, 2001, was rescheduled until June 8, 2001. At this time Middlebrook again requested to be appointed conflict-free counsel. On June 21, 2001, Jerome Capone, Esq. was appointed as conflict attorney to represent Middlebrook. The entire appellant delay lasted for 28 months until the affirmance of Middlebrook's direct appeal.
24. Clearly, the state initiated the delay in a deliberate attempt to gain an unfair advantage on Middlebrook and at this point cannot offer any justifiable reasons for the delay.
25. The record is clear that Middlebrook asserted his right to speedy trial in a timely fashion.
26. Because of the delay Middlebrook has suffered oppressive incarceration, anxiety and concern, including health problems and emotional stress, the^{un}availability of witnesses, and substantial impairment to the grounds of his direct appeal and defense, such as the review of rulings made by the trial Court denying a motion for post conviction relief. These issues were not raised on direct appeal because of his previous attorneys failure to docket a timely notice of direct appeal from the denial of the motion. Middlebrook cannot avoid the bar of Rule 61(i)(3).
(See attached affidavit detailing prejudice)

27. Middlebrook's right to a speedy trial and due process may have been violated by a delay of over six years between indictment and the affirmance of his direct appeal. Middlebrook asserts that the court should, 1) attempt to fashion a remedy to counteract any resulting prejudice demonstrated by Middlebrook. However no remedy may call back the time that constitutes the delay to fix the prejudice of the fundamental unfairness Middlebrook suffered. Any alternative remedy may itself violate Middlebrook's rights. Therefore, the court may have to decide whether 1) a new trial should be held or 2) whether due to the passage of time the charges must be dismissed.

Conclusion

WHEREFORE, for the reasons set forth herein and in the document incorporated by reference, Middlebrook respectfully request that the Court:

(1) order an evidentiary hearing and appoint counsel for Middlebrook;

(2) grant the motion for postconviction relief, reverse Middlebrook's conviction, and order a new trial; and

(3) grant all other appropriate relief.

Dated : 10/22/03

Mike Middlebrook

Mike Middlebrook

SBI 00295569 Unit S-1

Delaware Correctional Center

1181 Paddock Road

Smyrna, DE 19971

Certificate of Service

I, Nikemay Middlebrook, hereby certify that I have served a true and correct cop(ies) of the attached: (Motion) Petitioner's Traverse to Ans. and P & A in Support of Traverse + Appendix upon the following parties/person (s):

TO: _____

TO: _____

TO: _____

TO: _____

BY PLACING SAME IN A SEALED ENVELOPE and depositing same in the United States Mail at the Delaware Correctional Center, Smyrna, DE 19977.

On this 5th day of April, 2006

Nikemay Middlebrook

IM Nikerray Middlebrook
SBI# 295569 UNIT 19 B-L-7

DELAWARE CORRECTIONAL CENTER

1181 PADDOCK ROAD

SMYRNA, DELAWARE 19977

**U.S.M.S.
X-RAY**

Office of the Clerk
United States District Ct.
844 N. King St., Lockbox 18
Wilmington, DE
19801-3570

